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Supreme Court, U.S.
FILED
FEB 7 1992
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-1148

STATE OF SOUTH CAROLINA,

Petitioner,

v.

WARREN DOUGLAS MANNING,

Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of South Carolina

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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* DAVID I. BRUCK
DANIEL T. STACEY
Attorneys at Law

P. O. Box 12249
Columbia, South Carolina 29211
(803) 734-1330

ATTORNEYS FOR RESPONDENT

*Counsel of record

RESPONDENT'S STATEMENT OF THE QUESTIONS PRESENTED

1.

Does the South Carolina Supreme Court's assessment of the cumulative effect of defective instructions on reasonable doubt and circumstantial evidence in this case merit review by this Court?

2.

Does the federal constitution require a state supreme court to recite that it has conducted a harmless error analysis before it may reverse a capital murder conviction based on the cumulative effect of a series of erroneous instructions concerning reasonable doubt and circumstantial evidence?

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RESPONDENT'S STATEMENT OF FACTS

The respondent Warren Manning was convicted of the murder of a South Carolina state trooper. The state's case was entirely circumstantial, and centered on evidence that the trooper disappeared shortly after stopping respondent for a traffic violation, and on the state's claim that the trooper's pistol was later found near respondent's home. Pet. for Cert. at 36-37; State v. Manning, ___ S.C. ___, 409 S.E.2d 372, 373 (1991). Respondent testified in his own defense, and told the jury that he had fled after the trooper had stopped another vehicle, and that he had no involvement in the trooper's murder. Id. In addition, one of respondent's witnesses testified that she had seen what appeared to be the trooper's weapon in the possession of the police before it was supposedly "found" near respondent's home. Tr. 719-720.

In weighing the state's case and respondent's defense, the trial jury was guided throughout its deliberations by the following instructions on reasonable doubt:

> When I use the term, beyond a reasonable doubt, in telling you that, that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and that is a doubt for which you can give a real reason. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to. A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth, can give a real reason. So, it's to that degree of proof that the State is required to establish the elements of a charge.

Pet. for Cert. at 54-55, Tr. 1080 (emphasis supplied). Returning to the subject of the reasonable doubt standard during his

subsequent charge on circumstantial evidence, the court told the jury:

> Sometimes during the charge, and I might have used it, the phrase moral certainty might be used. There is no different degree of proof required. Moral certainty and beyond a reasonable doubt are the same thing in the eyes of the law. It might be a different way of stating the same proposition. Either of those two phrases, moral certainty, beyond a reasonable doubt, connote a degree of proof which is distinguished from an absolute certainty.

Pet for Cert. at 64; Tr. 1086-87.

On appeal, respondent pointed out that the trial judge's use of the term "substantial" as a modifier for "doubt," combined with his repeated assertion that the beyond a reasonable doubt standard was equivalent to "moral certainty," constituted two of the three defects identified by this Court in the charge found unconstitutional in Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328 (1990) (per curiam). Respondent also stressed that the charge given here contained an additional mischaracterization of the reasonable doubt standard not found in Cage. This was the trial judge's statement that a reasonable doubt was "a doubt for which you can give a real reason and a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason." Pet. for Cert. at 54; Tr. 1080. As respondent pointed out, State v. Manning, supra, Brief of Appellant at 52-53, these instructions improperly suggested that even if the State's proof had simply not persuaded the juror, his resulting doubt could not be regarded as "reasonable" unless he was also able to articulate a reason for it, Pettine v. Territory of New Mexico, 201 F. 489 (8th Cir. 1912), and even that he must be prepared to justify an acquittal to the court

by stating his reason for doubting the defendant's guilt. Respondent further noted that the prejudicial effect of this latter instruction was heightened by the solicitor's statement in his jury argument to the effect that a reasonable doubt is "just that, a doubt for which you, as a honest juror seeking the truth, can give a reason to; a reasonable doubt is doubt for which you can give a reason. Just that simple." Tr. 1044. See Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1441, 1451 (1990) (prejudicial effect of erroneous instruction may be increased by prosecutorial emphasis).

In reversing respondent's conviction, the South Carolina Supreme Court noted that this Court had recently disapproved both the "substantial doubt" and "moral certainty" instructions in Cage v. Louisiana. State v. Manning, supra, 409 S.E.2d at 374. In addition, the state supreme court identified a separate defect in the circumstantial evidence instructions. Its discussion of this additional error was as follows:

> In addition to the moral certainty charge in this case, the trial judge twice defined reasonable doubt as "a doubt for which you can give a real reason." While this definition may not suggest a higher degree of doubt in itself, we must examine it in the context of the charge given as a whole, including the following instruction regarding circumstantial evidence:
>
> > I would instruct you to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant and if such a reasonable explanation can be found you would find the Defendant not guilty. . . .
>
> This charge deviates from the circumstantial evidence charge cited in State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), that requires that the evidence "point conclusively to the guilt of the accused to the exclusion of every other hypothesis." In deviating from the Edwards charge, the charge given in this case turns

> the State's burden of proof on its head by requiring the jury to find a "reasonable explanation" of the evidence inconsistent with the defendant's guilt before it can find him not guilty. In conjunction with the further requirement in the charge that a jury must "give a real reason" in order to have a reasonable doubt, we find the charge as a whole suggests a higher degree of doubt than that required for acquittal. Rather than conveying to the jury the principle that the State must affirmatively establish appellant's guilt by probative evidence beyond a reasonable doubt, this charge could mislead a reasonable juror to focus exclusively on appellant's explanation of the evidence to determine the existence of reasonable doubt.

Pet. for Cert. at 42-43; 409 S.E.2d at 374-375. The state supreme court summarized its holding as being that "the defective aspects of the trial judge's charge on reasonable doubt rendered it so confusing that a reasonable juror could have interpreted the charge as a whole to allow a finding of guilt below that required by the Due Process Clause." 409 S.E.2d at 375.

WHY CERTIORARI SHOULD BE DENIED

1. Constitutionality of reasonable doubt instructions

The petition for writ of certiorari characterizes this case as presenting the question of whether the "substantial doubt" and "moral certainty" portions of the charge in this case violated the due process principles of Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328 (1990). In so characterizing the case, petitioner has omitted entirely from its discussion of the South Carolina Supreme Court's decision the trial judge's unusual circumstantial evidence instruction which required the jury "to find a 'reasonable explanation' of the evidence inconsistent with the defendant's guilt before it [could] find him not guilty." By ignoring this

portion of the state court's opinion, the petition has obscured the fact-bound nature of this case. The decision below presents no question of broader significance than whether due process is denied by a conviction resting on all of the instructions identified as defective by the state court--including the requirement that the jury explain away the state's circumstantial evidence in order to acquit. Counsel for petitioner has pointed to no other case in any other state or federal jurisdiction involving the same configuration of instructional error, and this case therefore appears to present no important or unsettled issue of federal law worthy of review by certiorari. See Sup.Ct.R. 10.

Should the Court nevertheless wish to undertake a detailed examination of the South Carolina Supreme Court's assessment of the reasonable doubt and circumstantial evidence instructions, respondent submits that it will find the state court's conclusions to have been correct. The South Carolina Supreme Court recognized here, as did this Court in Cage, that the cumulative effect of a series of erroneous or problematic instructions can impermissibly diminish the practical force of the reasonable doubt standard itself. The recent decisions from other jurisdictions which petitioner cites, Pet. for Cert. at 24-27, 29-31, all involve instructions substantially different from those given in this case, and the fact that other appellate courts have declined to find other sorts of reasonable doubt instructions to constitute reversible error neither casts into doubt the correctness of South Carolina's assessment of the particular instructions involved here,

nor establishes any sort of "conflict" requiring resolution by this Court.[1]

Petitioner argues that the state court was unduly rigorous in its review of the reasonable doubt instructions, and invokes this Court's admonition in Boyde against "parsing instructions for subtle shades of meaning." Pet. for Cert. at 12, quoting Boyde v. California, ___ U.S. ___, 110 S.Ct. 1190, 1198 (1990). But there is an obvious reason, apparently overlooked by petitioner, why instructions concerning the reasonable doubt standard require the careful scrutiny which this Court applied in Cage. This is that the "shades of meaning" in any instruction on reasonable doubt are central to the reasonable doubt principle itself. After all, the rule of reasonable doubt consists of nothing more than a particular degree of certainty, and even a slight lessening of that degree of certainty vitiates the constitutional right which the reasonable doubt standard embodies. To insist that jury instructions convey exactly this degree of certainty and nothing less, as the Court did in Cage, is not "technical hairsplitting," Boyde, supra, but "an essential of the due process guaranteed by the Fourteenth Amend-

[1]The same must be said of the reasonable doubt instructions referred to in the statement of Justice Stevens, concurring in the denial of certiorari in Gaskins v. McKellar, ___ U.S. ___, 111 S.Ct. 2277 (1991). Despite petitioner's characterization of the Gaskins reasonable doubt instructions as "similar" to those involved here, Pet. for Cert. at 23, the instructions in Gaskins did not include the burden-shifting circumstantial evidence charge which the South Carolina Supreme Court found so prejudicial in this case. Gaskins is thus inapposite, and even had this Court's denial of certiorari in Gaskins constituted an "opinion" of the Court, as petitioner seems to assume, Pet. for Cert. at i, Question II, it would not call into question the validity of the South Carolina Supreme Court's judgment in this case.

ment," Jackson v. Virginia, supra, 443 U.S. 307, 316 (1979), the denial of which "by itself so infect[s] the entire trial that the resulting conviction violate[s] due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973).

Against this backdrop, the reasonable doubt instructions given here plainly suffered from the defects identified by the South Carolina Supreme Court. The trial judge's repeated reminders that a reasonable doubt must be a "substantial" doubt for which the jurors could give a "real reason," that proof beyond a reasonable doubt amounted to no more than "moral certainty," and that the jurors must search for and find a reasonable explanation of the state's circumstantial evidence in order to acquit the accused, all combined to weaken and dilute the reasonable doubt standard, and to impermissibly lighten the state's burden of proof. Under In re Winship, 397 U.S. 358 (1970), and Cage v. Louisiana, supra, the state court was obligated to grant the relief it did, and there exists no reason to re-examine the state court's judgment.

2. Harmless error

Nor is any substantial federal question presented by respondent's complaint that the South Carolina Supreme Court should have articulated a harmless-error analysis before reversing. Given the circumstantial nature of the state's case, the prejudicial effect of the instructional errors was obvious. Respondent is aware of no provision of the federal constitution which requires a state supreme court to discuss in a published opinion the extent to which a criminal defendant was harmed by being deprived of the benefit of

the reasonable doubt standard, at least where, as here, the harm is evident from even a brief summary of the evidence presented at trial. See Pet. for Cert. at 36-39, State v. Manning, supra, 409 S.E.2d at 373. Unlike Arizona v. Fulminate, ___ U.S. ___, 111 S.Ct. 1246 (1991), this case does not involve a determination by a state court that any particular category of federal constitutional error can never be harmless, but only an implicit determination that the violation in this case was not harmless. Under these circumstances, the decision of the state supreme court to reverse respondent's conviction without spelling out its harmless-error analysis under Chapman v. California, 386 U.S. 18 (1967), presents no federal question for review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

* DAVID I. BRUCK
DANIEL T. STACEY

Post Office Box 12249
Columbia, S.C. 29211
(803) 734-1330

By: David I. Bruck
ATTORNEYS FOR RESPONDENT

February 7, 1992

* Counsel of record

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 7th day of February, 1992, one copy of the brief in opposition to the petition for writ of certiorari, together with one copy of the Motion for Leave to Proceed in Forma Pauperis were mailed, postage prepaid, to the below named counsel for Petitioner. I further certify that all parties required to be served have been so served.

Norman Mark Rapoport, Esquire
Assistant Attorney General
SC Office of the State Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

David I. Bruck

DAVID I. BRUCK
Attorney at Law

P. O. Box 12249
Columbia, South Carolina 29211
(803) 734-1330

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 7th day of February, 1992.

Lesley M. Coggiola (L.S.)
Notary Public for South Carolina
My Commission Expires: March 12, 1997